

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Nonforgivable
Administrative Penalty Order Issued
to Ecowater Systems.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

Administrative Law Judge Kathleen D. Sheehy considered this matter under Joint Stipulations of Fact submitted by the parties on May 9, 2005. The OAH record closed that day.

Kristen M. Olsen, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared for the Department of Health (the Department).

Patrick Foley, 801 West Main, P.O. Box 97, Marshall, MN 56258, appeared without counsel for Ecowater Systems (the Respondent).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make a final decision in this matter after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minn. Stat. § 14.61, the Commissioner may not make the final decision until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Dianne Mandernach, Commissioner of Health, 85 East Seventh Place, Suite 400, St. Paul, MN 55101, to find out how to file exceptions or present argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Should the Administrative Penalty Order, assessing a nonforgivable penalty in the amount of \$500 against Ecowater Systems, be affirmed?

The Administrative Law Judge concludes that the Administrative Penalty Order should be affirmed.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background Facts

1. Ecowater Systems is an installer of water conditioning equipment for residential and commercial customers. The business address for Ecowater Systems is P.O. Box 97, Marshall, MN 56258.^[1] Patrick Foley is the President of Ecowater Systems.

2. Gary Topp is an inspector with the Department. On November 13, 2003, Topp inspected plumbing work that had been done at Woody's Bar in Wood Lake, Minnesota. Tubing and fittings had been installed to provide potable water to an ice machine. The plumbing work had been performed by an employee of Ecowater Systems.^[2]

3. Topp consulted the Department's records and determined that Ecowater Systems had not filed a \$25,000 bond required of all persons contracting to do plumbing work.^[3]

4. On November 25, 2003, the Department issued a Notice of Apparent Violation to Ecowater Systems. The Notice of Apparent Violation indicated that Ecowater Systems did not appear to have filed a bond as required by Minn. Stat. § 326.40.^[4]

5. On December 4, 2003, Ecowater Systems responded by sending a copy of a certificate of filing a \$25,000 bond with the Secretary of State. The certificate indicated that the bond was filed on December 1, 2003.^[5]

Calculation of the Penalty

6. The Department adopted a *Plan for Use of Administrative Penalty and Cease and Desist Authority*, as required by Minn. Stat. § 144.99, subd. 7.^[6] Under the plan, the violation is first identified as forgivable or nonforgivable. The plan provides that a regulated party is not required to pay a forgivable penalty if the violation is corrected in a timely manner. A regulated party is required to pay a nonforgivable penalty even if corrective action is taken. Under the Plan, failure to file a bond is a serious violation requiring a nonforgivable penalty.^[7]

7. The second step in the Plan is to calculate the base penalty using a matrix that sets a penalty range for minor, moderate, and severe potential for harm on one axis and minor, moderate, or severe deviation from compliance on the other. Then the

penalty amount is adjusted using the statutory considerations of: (1) the willfulness of the violation, (2) the gravity of the violation; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained through the violation; and (6) other factors as justice may require.^[8]

8. The Department used this method and determined that the Respondent's deviation from compliance was severe, but that the potential for harm was minor (due to the absence of physical harm involved in the violation). The penalties in the matrix at that location range from \$500 to \$2,000. The Department determined that \$500 was the appropriate penalty and that no adjustments were appropriate.^[9]

9. Before issuing the APO, the Department did not provide individualized notice of the bonding requirement to contractors performing plumbing work. The Respondent contacted a number of other water conditioner dealers, and at least three of them were not aware of the bond requirement for plumbing work. One of these contractors was not informed of the bonding requirement when speaking to a Department staff member about licensing. The Respondent also contacted the Department regarding the **Catch Basin**, the Department newsletter addressing water quality issues. The Department staff member could not confirm that the Respondent had actually received the newsletter that informed dealers of the bonding requirement.^[10]

Procedural History of Administrative Penalty Order

10. On December 10, 2004, the Department issued an Administrative Penalty Order (APO) imposing a nonforgivable penalty of \$500 on Ecowater Systems for failing to file a \$25,000 plumbing code compliance bond as required by Minn. Stat. § 362.40, subd. 2, before doing plumbing work at Woody's Bar.^[11] On December 14, 2005, the Department served the APO on the Respondent by certified mail.

11. On January 18, 2005, Ecowater Systems appealed the APO.^[12]

12. The Department issued a Notice and Order for Prehearing Conference on March 10, 2005, setting a prehearing conference to take place before the Administrative Law Judge on March 23, 2005. At Mr. Foley's request, the prehearing conference was held by telephone on that date. In the Prehearing Order dated March 30, 2005, the Administrative Law Judge directed the parties to exchange proposed stipulations of fact by April 21, 2005, to determine whether there was agreement on the essential facts. In a telephone conference with the Administrative Law Judge on April 27, 2005, the parties agreed that the matter could be decided without a hearing based on stipulated facts. The hearing scheduled to take place in Marshall, Minnesota, on April 28, 2005, was canceled. The parties filed the Joint Stipulations of Fact on May 9, 2005.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Department have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. § 144.991, subd. 5.

2. The Department gave proper notice of the hearing, and all relevant procedural requirements have been fulfilled.

3. As the party proposing that action be taken, the Department has the burden of proving the facts at issue by a preponderance of the evidence.^[13]

4. Minn. Stat. § 144.99, subd. 7, requires the Department to use its Plan for Use of Administrative Penalty and Cease and Desist Authority in determining whether to issue an Administrative Penalty Order.

5. Minn. Stat. § 144.991, subd. 4(B), allows the Department to assess a nonforgivable penalty in the case of repeated or serious violations.

6. The Department's determination that the failure to file the bond prior to performing plumbing work is a serious violation for which a nonforgivable penalty should be imposed is consistent with the Plan, and the Department followed the provisions of the Plan in assessing a nonforgivable penalty in the amount of \$500 for this violation.

7. The Department properly considered the factors contained in Minn. Stat. § 144.991, subd. 1, in calculating the amount of the penalty. The penalty is reasonable in light of the statutory factors.

8. The Department is not obligated to give individualized notice of the bond requirement to persons performing plumbing work.

9. The Administrative Law Judge is precluded from recommending a change in the amount of the proposed penalty unless the Administrative Law Judge determines that the amount of the penalty is unreasonable based on the statutory factors.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Administrative Penalty Order imposing a nonforgivable fine of \$500 against Ecowater Systems be AFFIRMED in all respects.

Dated: June 8, 2005

s/Kathleen D. Sheey

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Minnesota Department of Health is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Joint Stipulations of Fact.

MEMORANDUM

The only issue raised in this proceeding is the Respondent's argument that it received inadequate notice of the need to file a \$25,000 bond before performing plumbing work. The Respondent and other dealers in the water conditioner installation business were not aware of the requirement. The Respondent asserts that individualized notice (such as certified mail) should be required before the provision can be enforced.

The \$25,000 bond requirement has been in place since 1999.^[14] The bond is required by statute. There is no legal basis for imposing a requirement that the Department notify all regulated persons of all possible statutory requirements before taking action to enforce those requirements. The Department issues a newsletter to highlight matters that are of concern to regulated persons. Lack of prior notice of the bond requirement is not a defense to the APO issued in this matter.

K.D.S.

^[1] Joint Stipulations of Fact ¶ 2.

^[2] Joint Stipulations of Fact ¶¶ 1-3.

^[3] Joint Stipulations of Fact ¶¶ 4-5.

^[4] Joint Stipulations of Fact ¶ 7. The Department also raised questions about materials used in the plumbing work, but that issue is not part of this contested case proceeding.

^[5] Joint Stipulations of Fact ¶ 8.

^[6] Joint Stipulations of Fact ¶¶ 9-10, 12.

^[7] Joint Stipulations of Fact ¶¶ 10-11.

^[8] Minn. Stat. § 144.991, subd. 1.

^[9] Joint Stipulations of Fact ¶ 13.

^[10] Joint Stipulations of Fact ¶ 16.

^[11] Joint Stipulations of Fact ¶ 14.

^[12] Joint Stipulations of Fact ¶ 18.

^[13] Minn. R. 1400.7300, subp. 5.

^[14] Laws of Minnesota 1999, Chapter 245, Article 2, Secs. 39-41.